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Attorney for Montana Securities Department

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE  
OFFICE OF THE MONTANA STATE AUDITOR  
HELENA, MONTANA

IN THE MATTER OF

NEXT FINANCIAL GROUP  
2500 Wilcrest Drive, Suite 620,  
Houston, TX 77042,  
a broker-dealer firm;

GARY FALBER, individually, and in his  
capacity as a registered securities  
salesperson and investment adviser  
representative;

RYAN FALBER, individually and in his  
capacity as a registered securities  
salesperson and investment adviser  
representative,

Respondents.

CASE NO. SEC-2009-89

NOTICE OF PROPOSED AGENCY  
DISCIPLINARY ACTION AND  
OPPORTUNITY FOR HEARING

Staff of the Securities Department ("Department") for the Commissioner of Securities and Insurance, Office of the Montana State Auditor ("Commissioner"), pursuant to the authority of the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*, is proposing to the Commissioner that she take specific action against NEXT FINANCIAL SERVICES (NEXT) with a principal place of business at 2500 Wilcrest Drive, Suite 620, Houston, TX 77042, GARY

FALBER (G. Falber) and RYAN FALBER (R. Falber) named above for violations of the Montana Securities Act. The Commissioner has authority to take such action under the provisions of Mont. Code Ann. §§ 30-10-102, 30-10-107, 30-10-201, 30-10-301, 30-10-304, 30-10-305, and 30-10-309.

In particular, the Department's staff is recommending specific action against NEXT, G. Falber and R. Falber, including imposition of appropriate fines and appropriate restitution with interest, pursuant to the provisions of the Montana Securities Act.

Service of process is pursuant to Mont. Code Ann. § 30-10-107 (8), (2009).

### **REASONS FOR ACTION**

There is probable cause to believe that the following facts, if true, justify and support the identified specific action. Furthermore, there is reason to believe that the following facts will be proven true and, therefore, justify and support an order enjoining Respondents to cease and desist their activities in violation of the Montana Securities Act.

### **ALLEGATIONS**

1. The Department received a complaint on or about September 8, 2009. In the complaint a Montana citizen, identified herein as Complainant, alleged that after a single meeting on March 9, 2009, with G. and R. Falber, salespeople for NEXT, the Complainant signed documents that would direct Complainant's investment funds to be invested in the stock market using a strategy explained by G. and R. Falber that involved technical analysis and investing in and out of the market.
2. The Complainant told the Department Complainant transferred previous investment accounts from Charles Schwab and Waddell & Reed to the Falbers as well as providing a check for

\$45,000 from Complainant's savings to the Falbers. Complainant told the Department the additional \$45,000 from savings was added to the investment because the Falbers indicated they would only accept investment accounts of at least \$200,000. Complainant's total investment with the Falbers is \$210,000.

3. The Falbers placed all of Complainant's funds in a JJNL Variable Fund, single premium annuity. Complainant alleges when the Falbers were questioned about the annuity purchase they indicated the original fund they discussed was no longer available.

4. Complainant alleges the Falbers were told Complainant had no interest in annuities due to a bad experience Complainant had with an AXA Equitable annuity.

5. Further, Complainant asserts a need for liquidity and an income stream because Complainant is a cancer survivor and needs access to the money.

6. G. and R. Falber reside in Wyoming. G. Falber is and, during the relevant period<sup>1</sup>, was registered with the Montana Securities Department as a broker/dealer salesperson and investment adviser for NEXT. R. Falber was registered with the Montana Securities Department as a broker/dealer salesperson and investment adviser representative during the relevant period.

7. On September 24, 2009, the Department received a compact disc containing information it requested from NEXT. A review of documents indicates Complainant held investments at Charles Schwab and Waddell & Reed prior to meeting with the Falbers. Additionally, Complainant had access to and withdrew funds from the Schwab account as needed.

8. Complainant's Schwab account consisted of individual equities and mutual funds having a value of approximately \$137,062 on February 28, 2009. Complainant's investments with

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<sup>1</sup> The relevant period is from March 1, 2009, to the present.

Waddell & Reed were a group of dividend-generating mutual funds that had a value of approximately \$28,297 on February 28, 2009.

9. According to Complainant, between the JJNL Variable Fund and AXA, these two annuities represent nearly 100% of her liquid net worth. However, the JJNL Variable annuity application indicates the annuity only represents 20% of Complainant's net worth.

10. Complainant signed all the forms provided by the Falbers, but it appears the information gathered on the form was written in by one of the Falbers. The forms are all dated March 9, 2009. Both Falbers solicited Complainant for investing but only R. Falber's signature is on all documents requiring a representative's signature.

11. Complainant's NEXT new account form lists income and growth as Complainant's investment objectives. The JJNL Variable annuity does not provide an income stream. Furthermore, a review of the objectives of the JJNL Variable annuity indicates its performance is supposed to replicate the performance of the Dow Jones Consumer Services Index<sup>2</sup>, which does not meet the investment objectives of the Complainant reflected in the new account form.

### **CONCLUSIONS OF LAW**

1. The Montana State Auditor is the Commissioner of Securities (Commissioner) pursuant to Mont. Code Ann. §§ 30-10-107 and 2-15-1901.

2. The Commissioner has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 30-10-102, 30-10-107, 30-10-201, 30-10-301, 30-10-304, 30-10-305, and 30-10-309.

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<sup>2</sup> The Dow Jones U.S. Consumer Services Index measures the performance of consumer spending in the services industry of the U.S. equity market.

3. The administration of the Securities Act of Montana ("Act"), Mont. Code Ann. § 30-10-101, *et seq.*, is under the supervision and control of the Securities Commissioner pursuant to Mont. Code Ann. § 30-10-107.

4. The Commissioner shall administer the Securities Department to protect investors pursuant to Mont. Code Ann. § 30-10-102.

5. Respondents G. and R. Falber violated Mont. Code Ann. § 30-10-201 (13) (g) and ARM § 6.10.401 (2) (f) by recommending the sale of Complainant's Schwab and Waddell & Reed portfolios to purchase the JJNL variable annuity without grounds to believe the recommendation was suitable.

6. Respondents G. and R. Falber violated Mont. Code Ann. § 30-10-201 (13) (g) and ARM 6.10.401 (2) (f) by purchasing the JJNL variable annuity without authorization.

7. Respondents G. and R. Falber violated Mont. Code Ann. § 30-10-301 (1) (b) by making untrue statements of material fact and omitting material facts regarding the suitability of the JJNL variable annuity to Complainant in connection with the offer, sale and purchase of this security.

8. Respondent NEXT violated Mont. Code Ann. § 30-10-201 (13) (k) by failing to reasonably supervise the Falbers to ensure compliance with the Montana Securities Act.

#### **RELIEF SOUGHT**

1. Order Respondents to pay restitution to the victim in this case, including 10% interest from the date of the wrong-doing pursuant to Mont. Code Ann. § 30-10-309;

2. Order Respondents to pay fines not to exceed \$5,000 for each identifiable violation of Mont. Code Ann. § 30-10-301 (1) (b) pursuant to Mont. Code Ann. § 30-10-305 (3);

## STATEMENT OF RIGHTS

You are entitled to a hearing to respond to this notice, and to present evidence and arguments on all issues involved in this case. You have a right to be represented by an attorney at any and all stages of this proceeding. You may demand a formal hearing before a hearing examiner appointed by the Commissioner pursuant to the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-601, *et seq.*, including § 2-4-631. If you demand a hearing, you will be given notice of the time, place and the nature of the hearing.

If you want to contest the proposed action under the jurisdiction of the Commissioner, you must advise the Commissioner within 15 days of the date you receive this notice. You must advise the Commissioner of your intent to contest the proposed action by writing to Roberta Cross Guns, Attorney for the Securities Department, State Auditor's Office, 840 Helena Avenue, Helena, MT 59601. Your letter must clearly indicate whether you demand a hearing, or whether you waive formal proceedings and, if so, what informal proceedings you prefer for disposition of this case. Pursuant to Mont. Code Ann. § 2-4-603(2), you may not request to proceed informally if the action could result in suspension, revocation or any other adverse action against a professional license. Should you request a hearing on the matters raised in this Notice, a hearing must be held within 45 days of the request, unless postponed by mutual consent of the parties, pursuant to Mont. Code Ann. § 33-1-701 (2).

Should you request a hearing, you have the right to be accompanied, represented, and advised by counsel. If the counsel you choose has not been admitted to practice law in the state of Montana, he or she must comply with the requirements of *Application of American Smelting and Refining Co.*, 164 Mont. 139, 520 P.2d 103 (1973), and *Montana Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200.

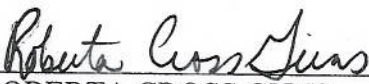
### CONTACT WITH SECURITIES COMMISSIONER'S OFFICE

If you have questions or wish to discuss this matter, please contact Roberta Cross Guns, Attorney for the Securities Department, at 840 Helena Avenue, Helena, MT 59601, (406) 444-2040, or, within Montana, (800) 332-6148. If an attorney represents you, please make any contacts with this office through your attorney.

### POSSIBILITY OF DEFAULT

Failure by Respondents to give notice or to advise of Respondents' demand for a hearing or informal procedure within 15 days, will result in the entry of a default order imposing the disciplinary sanctions against Respondents, without further notice to Respondents, pursuant to A.R.M. 6.2.101 and the Attorney General's Model Rule 10, A.R. M. 1.3.214.

DATED this 4<sup>th</sup> day of May, 2010.

  
ROBERTA CROSS GUNS  
Attorney for Department of Securities

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the 4<sup>th</sup> day of May, 2010, by US mail, certified first-class postage paid, to the following:

NEXT Financial Group  
2500 Wilcrest Drive, Suite 620  
Houston, TX 77042

Gary Falber  
7550 West Highway 220  
Casper, WY 82604

Ryan Falber  
1035 South Chestnut, Apt 1  
Casper, WY 82601

